IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STATE OF MISSISSIPPI

v. **CASE NO.: 2013-M-1220**

ROBERT SHULER SMITH, ET AL.

BRIEF OF FLORIDA CARRY, INC., AMICUS CURIAE

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SUMMARY OF ARGUMENT

The permanent injunction entered by the Hinds County Circuit Court improperly bans the open carriage of firearms in violation of the SECOND AMENDMENT to the CONSTITUTION OF THE UNITED STATES as well as the CONSTITUTION OF THE STATE OF MISSISSIPPI. Open carry is beyond the power of the Legislature (or the courts) to infringe. Open carry is a fundamental constitutional right. The Circuit Court improperly stated the *right* of open carry is not infringed because there exists a somewhat similar *privilege* of concealed carry. Rights are distinct in nature from privileges and cannot be substituted in place of one another. The injunction causes irreparable harm.

This brief will show that the Circuit Court should be reversed by demonstrating the following: 1) that there is a constitutional right to keep and bear arms; 2) that any burden on the right is subject to strict scrutiny; 3) that open carry is the recognized method for exercising the right; 4) that licensed concealed carry is a privilege that cannot substitute for the right; 5) the Circuit Court's total ban on open carry is facially unconstitutional; and 6) the Circuit Court's injunction is causing irreparable harm.

ARGUMENT

The right to own and to bear firearms is an enumerated right under the United States Constitution subject to strict scrutiny

The SECOND AMENDMENT to the UNITED STATES CONSTITUTION states: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." This enumerated right has been interpreted by the Supreme Court of the United States as a fundamental individual right to keep and bear arms for the purpose of self-defense. *District of Columbia v. Heller*, 554 U.S. 570, 602 (2008). The Second Amendment applies to the states through the Fourteenth Amendment. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035, 3042 (2010). This enumerated right of the people to keep and bear arms is subject only to reasonable regulation; the Constitution does not permit a total ban on the right. *Heller*, 554 U.S. at 647 (total ban of an entire class of arms in common use for lawful purposes unconstitutional).

The U.S. Supreme Court has held that the enumerated right of the SECOND AMENDMENT is analogous to application of the rights guaranteed under the FIRST AMENDMENT of the UNITED STATES CONSTITUTION. *McDonald*, 130 S.Ct. at 3047 (rejecting any argument that the SECOND AMENDMENT is unique among the first eight amendments).

A law that burdens the exercise of a fundamental constitutional right is subject to strict scrutiny. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973); *United States v. Hancock*, 231 F.3d 557, 565 (9th Cir. 2000); *Fla. Retail Fed'n v. Att'y Gen. of Fla.*, 576 F. Supp. 2d 1281, 1288 (N.D. Fla. 2008). Strict scrutiny is a two prong

test: first the court determines what is the compelling governmental interest and second it determines whether the law in question has been narrowly tailored to achieve the compelling governmental interest. *Fla. Retail Fed'n*, (quoting *Williams v. Pryor*, 240 F.3d 944, 947-48 (11th Cir. 2001)). While strict scrutiny is ordinarily used in judicial analysis of legislative enactments it should also be considered in cases such as this where a lower court has made illegal conduct that the Legislature has expressly defined to be lawful. Indeed it is an odd situation where the court determined the Legislature granted its citizens too many rights!

Some subsequent opinions of various courts have pointed out that the *Heller* Court limited its holding to the keeping of arms in one's home. However, the decision was so limited because keeping of arm's in one's home was all that was at issue in the case. Nothing in *Heller* even remotely suggested that the right to *bear* arms was limited to one's home. The Seventh Circuit recently considered this issue when Judge Posner eloquently explained why a ban on carry outside the home was constitutionally impermissible. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). The court's opinion discussed the rationale and impact of bearing of arms outside the home both historically and in modern day Chicago. As *Moore* made clear, the *Heller* Court found dispositive that the right to bear arms included a right to be prepared for confrontation. *Moore* noted that whether on the frontier or in a modern urban setting one is much more likely to be confronted outside the home than in it.

Open Carry is the Law of This State According to the Plain Text of the Mississippi Constitution

Legalized open carry is the super majority view as all but six states allow some form of licensed or unlicensed open carry of firearms. David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 Santa Clara L. Rev. 1113, 1178 (2010). Mississippi has been what is commonly called an "open carry" state at least since the passage of the MISSISSIPPI CONSTITUTION of 1890 constitution. In fact, it has been an open carry state much longer as the original MISSISSIPPI CONSTITUTION of 1817, art. I, § 23, titled the "Declaration of Rights," provided: "That the general, great and essential principles of liberty and free government may be recognized and established, We Declare: . . . Every citizen has a right to bear arms in defence [*sic*] of himself and the State."

When the CONSTITUTION was amended in 1890 the language was changed to bolster the right against infringement by additional text stating that the right to [open carry] "shall not be called in question."[1] Thus under the present CONSTITUTION only the carrying of *concealed* weapons can be regulated or forbid. The Circuit Court, however, imposed an outright ban on open carry. See *infra* at page 10.

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[1] The full text MISSISSIPPI CONSTITUTION of 1890, art. 3, § 12 is:

> The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons.

Bearing concealed firearms under the Second Amendment is a privilege. Because concealed carry is a privilege subject to regulation there must be an alternative which protects the fundamental right. That alternative is open carry

As the Supreme Court made clear in *Heller* and *McDonald*, the carrying of *concealed* firearms has long been recognized as being outside the strict protections of the SECOND AMENDMENT. Every court that has considered the issue since these cases has confirmed the fact that the carrying of concealed firearms is a privilege, not a right. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *Woollard v. Gallagher*, 2013 U.S. App. LEXIS 5617 (4th Cir. 2013) (assuming that the right extends outside the home but upholding restrictions on the issuance of concealed carry permit); *Kachalsky v. County of Westchester*, 701 F.3d 81,87 (2d Cir. 2012) (finding no right to carry outside the home); *Peterson v. Martinez*, 2013 U.S. App. LEXIS 3776 (10th Cir. 2013) (upholding CO state statute preventing out of state resident from obtaining a concealed carry permit, a privilege, in an open carry state); *Bonidy v. U.S. Postal Service*, 2013 U.S. Dist. LEXIS 95435 (Dist. CO 2013) (holding that there is a right to openly carry firearms outside the home for a lawful purpose, subject to such restrictions as may be reasonably related to public safety and invalidating a long standing postal regulation regarding possession of firearms on postal service property); *People v. Yanna*, 824 N.W.2d 241 (Mich. Ct. App. 2012) (holding that the bearing of arms openly is constitutionally protected by the Second Amendment).

The SECOND AMENDMENT protects the right to keep and bear arms outside the home in self-defense. As discussed above, the Seventh Circuit most recently reviewed two combined cases challenging the constitutionality of an Illinois law that banned the

carrying of loaded and immediately accessible guns. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). Judge Posner delivered the majority opinion to explain that the United States Supreme Court's opinions in *Heller* and *McDonald* establish the prevailing historical analysis that "the Second Amendment protects the right to keep and bear arms for the purpose of self-defense." *Moore*, 702 F.3d at 935 (quoting *McDonald v. City of Chicago*, 130 S. Ct. at 3026, citing to *District of Columbia v. Heller*, 554 U.S. at 593-94). The court stated that because "[c]onfrontations are not limited to the home" a right to carry a firearm outside the home and is a logical step since "*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home, as when it says that the amendment 'guarantee[s] the individual right to possess and carry weapons in case of confrontation.'" *Moore*, 702 F.3d at 935-36 (citing *Heller*, 554 U.S. at 592). "To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*." *Moore*, 702 F.3d at 937.

Thus, because there is a fundamental right to self-defense outside the home the Court is obligated to ensure that the right is freely exercisable. Judge Posner illustratively explained:

> A woman who is being stalked or has obtained a protective order against a violent ex husband is more vulnerable to being attacked while walking to or from her home than when inside. She has a more vital argument to carry a gun in public for self-defense than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress. But Illinois wants to deny the former claim, while compelled by *McDonald* to honor the latter. That creates an arbitrary difference.

Moore, 702 F.3d at 937. Just as Illinois was obligated to make the right of self-defense available outside the home, Mississippi is obligated to make the right of bearing arms available without subjecting it to treatment as a privilege, which may be curtailed or taken away.

A privilege which may be taken away is no substitute for the right

Open carry is the core of the right to bear arms. Since concealed carry is a privilege and given that there is a right to bear arms outside the home, there is only one manner in which firearms can be borne in the exercise of the right–openly.

A privilege which may be taken away on legislative (or judicial) whim is no right. *State v. Reid*, 1 Ala. 612 (1840). Regulations that limit a constitutional right to keep and bear arms must leave some realistic alternative means to exercise the right." *State v. Hamdan*, 665 N.W. 2d 785 (Wis. 2003). The allowance of a privilege by the legislature is no substitute for a fundamental right, which according to *Heller*, was a recognized right pre-dating the U.S. Constitution. *Heller*, 544 U.S. at 592.

In rejecting the District of Columbia's argument that the SECOND AMENDMENT provided only a collective right connected to militia service, *Heller* relied on at least two 19th century state supreme court cases interpreting the SECOND AMENDMENT as protecting an individual right to carry weapons openly - but not concealed - in public. More specifically, *Heller* cited approvingly to *Nunn v. State*, 1 Ga. 243, 254 (1846), in which "the Georgia Supreme Court construed the Second Amendment as protecting the `natural right of self defensce [*sic*]' and therefore struck down a ban on carrying pistols openly." The *Heller* majority described *Nunn* as "perfectly captur[ing] the way in which

the operative clause of the Second Amendment furthers" the AMENDMENT'S purpose. Similarly, *Heller* also cited with approval *to State v. Chandler*, 5 La. Ann. 489 (1850), in which "the Louisiana Supreme Court held that citizens had a right to carry arms openly" under the SECOND AMENDMENT. *Heller*, 128 S. Ct. at 2809 (citing *Chandler*, 5 La. Ann. at 490); *see also Reid*, 1 Ala. 612.

When Abolishing The Right of Open Carry The Circuit Court Confused The Right of Open Carry With The Privilege of Concealed Carry

First we must remove any doubt that the Circuit Court sought an outright, complete ban on open carry. In paragraph 2 of the Order the Circuit Court said, "This Court has found no case law, or any other authority, which gives an individual the absolute right 'to open carry' a weapon, as contended by the State. . . . This, under no circumstances, would allow an individual to walk around openly carrying a weapon." (Emphasis added). Because there are absolutely no circumstances under which a citizen can openly carry a weapon, the Circuit Court's Order is a complete and total ban on open carry.

The Circuit Court is manifestly wrong to say that the right to keep and bear arms is not infringed because "Citizens have always had the right to carry a weapon and that right will continue to exist [because]. . . A legally obtained permit will continue to allow a citizen to carry a concealed weapon." Circuit Court Order at page 3. Restated, the Circuit Court said the *right* is not infringed because the Legislature allows a related *privilege*. This is tantamount to saying that the First Amendment is not offended by prohibiting possession of books except by persons who have received a public library card.

In effect, the Circuit Court says that the open carriage of arms can be proscribed so long as there is a statutory system – subject to the whims of whatever majority may then occupy the Legislature – by which a concealed carry license can be obtained. It is respectfully submitted that the Circuit Court has it completely backwards. The MISSISSIPPI CONSTITUTION makes clear that the carrying of *concealed* weapons can be regulated or forbidden but the [open carry] of arms "shall not be called in question." Under the clear terms of the MISSISSIPPI CONSTITUTION of 1890, art. 3, § 12 the Legislature is only authorized to regulate or forbid the carrying of concealed weapons.

The Legislature previously defined "concealed" as "concealed in whole or in part." MISS. CODE ANN. § 97-37-1(1) (2012). Unfortunately, some prosecutors and judges interpreted this to mean that openly carried, holstered firearms, or even a pistol hanging by a leather strap from one's neck, would constitute a concealed firearm because at least some portion, no matter how small, of the firearm was hidden from observation by the holster, hand, or throng. See *In the Interest of L.M, Jr., S.T. and D.S. v. Mississippi*, 600 So.2d 967, 971 (Miss. 1992) (Chief Justice Lee, concurring opinion).

During the 2013 regular legislative session the Legislature corrected this confusion by passing House Bill 2 (by an overwhelming majority) to remove the "in whole or in part" language from the statute and add a new subsection which made clear that "concealed" did not include, among other things, holstered firearms that were readily identifiable by common observation. Thus, the Legislature did that which the Courts had not: it provided a method (or clarification) by which the right could be exercised without first obtaining a government-issued license to enjoy.

There are cognizable benefits to open carry of arms

While there is no obligation on the part of the Legislature or the State to show that there is any specific benefit to conduct the Legislature has chosen not to prohibit (assuming, in arguendo, that the State could prohibit open carry to begin with), there are benefits to the open carrying of firearms that have long been recognized in legislative and legal analysis. A 2006 FBI study essentially concludes that criminals do not open carry. *See Dr. Anthony Pinizzotto, et al., Violent Encounters: A Study of Felonious Assaults on Our Nation's Law Enforcement Officers*, FBI (2006) (finding that violent criminals carefully "conceal" their guns and "eschew holsters"). Summary available at: http://www.forcesciencenews.com/home/detail.html?serial=62.

One benefit of open carry is that the first and most effective method of self-defense is deterrence. Carrying a concealed firearm leads the would-be criminal to believe that a potential victim is unarmed and therefore an easier target for aggression, thus removing all deterrent value of bearing arms. The requirement that handguns may only be carried concealed destroys all but the most fleeting thought of consequence to serve as a deterrent to criminal attack. *Reid*, 1 Ala. at 619 (holding that only openly carried arms are efficient for defense).

A second benefit of open carry that courts have historically recognized is that open carry achieves a governmental interest by preventing a secretly armed person from provoking an argument only to then take undue advantage. *Sutton v. State*, 12 Fla. 135 (Fla. 1868); *In the Interest of L.M, Jr., S.T. and D.S.*, 600 So.2d at 972 (Chief Justice Lee concurring opinion).

Again, while the State is under no obligation to show that the Legislature was right in determining concealed carry should be defined to clearly allow open carry, there is a sufficient historical precedent and established governmental interest justifying a legislative determination that open carry should be lawful without regard to whether or not it is constitutionally protected.

The Circuit Court's attempt to limit the exercise of the right to bear arms is facially unconstitutional

The opinions in *Heller* and *McDonald* are the floor of application of gun rights to the citizens of the states, not the ceiling. Similarly, a legislative determination defining the difference between a concealed and unconcealed firearm is the floor upon which the courts must build. While a court can find constitutionally protected conduct which is declared by a legislature to be unlawful, a court cannot declare constitutionally protected conduct unlawful, especially if the Legislature has declared it is permissible. More simply stated, the courts cannot make illegal what the CONSTITUTION and Legislature have affirmed legal, yet that is exactly what the Circuit Court did.

The Circuit Court Erred in finding that no harm would result from its Injunction

When granting the injunction the Circuit Court stated, "The Court can not identify any potential harm which might be caused to the State by granting the injunction." The Court forgets that any constitutional deprivation is an irreparable harm. Every day that the present injunction is allowed to stand the basic fundamental individual rights of Mississippians and visitors to the State are irreparably harmed. There is no remedy that can adequately compensate them for the loss of their rights under the SECOND

AMENDMENT and MISSISSIPPI CONSTITUTION. *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) (stating that deprivation of a constitutional right constitutes irreparable injury; holding that impairing the right to the right to bear arms was a deprivation of SECOND AMENDMENT rights).

CONCLUSION

The Mississippi Legislature's decision to remove confusion surrounding the open carry of firearms was well within the discretion of the legislative branch and removed what was arguably a constitutionally diseased interpretation of the "concealed in whole or in part" language of § 97-37-1. It is neither a court's duty nor right to enjoin legislation simply because it does not agree with the policy decisions of the legislative body. Such a practice offends the basic notions of separation of powers on which our system of government is predicated.

Equally important, however, is the fact that the right to keep and bear arms necessarily includes the right to bear arms openly. Action by any court which would seek to impair the fundamental individual right to bear arms openly merely because the court can imagine harms that might result from the exercise of the right begins a fast slide down a very slippery slope.

Amicus, Florida Carry, Inc., respectfully requests this Court vacate the permanent injunction entered by the Hinds County Circuit Court in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on the following persons by U.S. Mail, properly addressed and postage prepaid, and or by electronic mail where indicated:

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